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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-64

No. 219

SAMUEL NEWFIELD, TRUSTEE OF THE 671 PROSPECT AVENUE HOLDING CORPORATION, *Petitioner*,

vs.

EAST RIVER SAVINGS BANK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

W. CAMERON BURTON,
MAX ROCKMORE,
Counsel for Petitioner.

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VS.

EAST RIVER SAVINGS BANK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Samuel Newfield, as trustee of the 671 Prospect Avenue Holding Corporation, Bankrupt, prays that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit, entered in the above proceeding on the 10th day of April, 1941, affirming an order of the District Court for the Southern District of New York, which reversed an order of the referee who overruled the objections of the respondent to the jurisdiction of the referee to summarily determine the value of chattels which were taken from the possession of the trustee by a receiver appointed by the Supreme Court of the State

of New York in an action brought by respondent to foreclose its realty mortgage. The affirmance by the Circuit Court of Appeals was without prejudice to proceedings to recover possession of the chattels or the proceeds of their sale, or to a plenary suit to recover damages for using or converting them.

The opinion of the Circuit Court of Appeals is printed at page 33 of the printed record and is reported in 118 F. 2d 455.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240, Subdivision (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 347 (a).

2. The decree of the Circuit Court of Appeals sought to be reviewed is dated April 10, 1941 (R. 37). Said decree affirms the order of the District Court in favor of the respondent here.

Statute Involved.

Section 23 of the Bankruptcy Act, 11 U. S. C. A. 46.

Summary Statement of the Matter Involved.

The bankrupt owned and operated a building at 671 Prospect Avenue, Bronx Borough, New York, for catering purposes. The building was equipped with the necessary fixtures, furniture and kitchen utensils adapted to that type of business. The building was subject to a mortgage held by the bank for $116,500, which the bank claimed covered both the realty and the personalty.

After the petitioner's election as trustee (he having theretofore taken possession of the building and its contents as bankruptcy receiver) he moved in the District Court for an order to limit the scope of the bank's mortgage lien to the realty. The bank filed an answer to that petition, asserting

that the mortgage gave it a lien on the personalty as well; and after a trial which tested that question the referee decided in petitioner's favor and held that the mortgage covered the real property only. The bank successfully reviewed the order which followed and an appeal by petitioner resulted in an affirmance. 97 F. (2d) 513.

Sometime later the court's decision was vacated, the mandate recalled and the appeal restored for reargument. That resulted in a reversal of the District Court's order which had in turn reversed the referee's order and the Court held, as did the referee, that the mortgage created a lien in the bank's favor over the realty alone and did not affect the bankrupt's chattels which were located in the building. 105 F. (2d) 960.

Before this question was raised or determined, however, petitioner went into, took and remained in possession of the building and its contents until the bank moved in the District Court for leave to foreclose its mortgage. That motion was granted and an action was brought in the New York Supreme Court, petitioner being made a party thereto. The bank moved in that Court for the appointment of a receiver in foreclosure and notwithstanding petitioner's resistance thereto the application was granted and Francis L. Valente was appointed receiver. He took from petitioner possession of the building and its contents and collected the rents for both building and chattels from November, 1937, to July, 1938, for which he accounted to the bank as mortgagee. The mortgage suit continued in the State Court after the decision of the Circuit Court of Appeals on the first appeal and the bank took title to the premises and its contents upon sale in foreclosure. The receiver continued to collect the rents from the building and for the use of the chattels until the bank sold the building and its contents to one Infeld, to whom it gave title to both, and Infeld is now in sole possession thereof.

Subsequent to the second decision of the Circuit Court of Appeals as reported in 105 F. (2d) 960, petitioner moved in the District Court to fix the damages sustained by him as a result of the improper assertion of title to and possession of the chattels by the bank. On that application the bank appeared and submitted an answer in opposition, *which did not challenge the jurisdiction of the Bankruptcy Court,* but merely asserted among other things that one Gussie Hutt, the holder of an alleged mortgage on the same chattels, had rights superior to those of petitioner, and on the strength of that statement District Judge Coxe denied the motion "without prejudice to a motion before the referee for relief against the bank or anyone else or a plenary action" (R. 8).

It then became necessary for petitioner to clear the title to the assets, and to that end he brought suit in the District Court against the bankrupt, against Chateau De Luxe, Inc., an alleged assignee of the chattels, and against Mrs. Hutt the alleged mortgagee, to set aside both the transfer and the mortgage. That trial resulted in a judgment for petitioner, so that at the time the instant application came before the District Court petitioner had complete and absolute unencumbered title to the chattels.

Throughout the course of these proceedings and for a period of over three years the chattels, which were always assets of the bankrupt estate, were taken over and appropriated by the bank, which collected the rents from their use and the avails of their sale.

The present application was thereupon made to the District Court to recover not only the value of the chattels unlawfully appropriated by the bank, but the value of their use while the bank was in possession thereof and for which it had received rents. Notwithstanding the bank's repeated appearances throughout the various controversies preced-

ing that application, the bank for the first time on this motion raised the question of the referee's power to summarily determine this controversy. It claimed that the District Court did not have summary power to fix the loss it had itself brought about by its unwarranted taking of assets which belonged to the petitioner and that petitioner was bound to seek his relief in a different forum.

The Referee in overruling the Bank's objection said (R. 16):

> "* * * I am going to determine that this Court has jurisdiction; that by the decisions of the various courts the title to this property was vested in the trustee from the inception of this bankruptcy; and that, therefore, this Court has the right in a peremptory summary fashion to pass upon the question of what damage, if any, has been sustained by this trustee by virtue of any acts that they may be able to prove that the bank violated the trustee's rights in the use of this property."

From the order which followed, the bank took a review in the District Court where the referee's order was reversed, Judge Knox holding that upon the authority of *In re Reading Engineering, Inc.*, 29 F. (2d) 22, the damages could not summarily be ascertained in the bankruptcy court.

From the decision of the Circuit Court of Appeals affirming said order without prejudice to other summary proceedings to recover possession of the chattels or proceeds of sale of them, or to a plenary suit to recover damages for using or for converting them, this application is made.

Specification of Errors.

The Circuit Court of Appeals erred in holding that the trustee's only remedy to recover the value of the chattels unlawfully taken after bankruptcy intervened was by a plenary action. That is the question here to be decided.

The chattels having been in the custody of the bankruptcy court which had exclusive control over them and over the controversy respecting them, that court was empowered under familiar legal and equitable principles to render a complete determination respecting them unless the Bankruptcy Act declares otherwise. The bankruptcy court has exclusive possession of all the property of the bankrupt upon the filing of the petition in bankruptcy. *Page* v. *Edmunds,* 187 U. S. 596, 23 S. Ct. 200, 47 L. Ed. 318. The court also has summary jurisdiction to recover property of the trustee unlawfully taken from him. *White* v. *Schloerb,* 178 U. S. 542, 20 S. Ct. 1007, 44 L. Ed. 1138; also where the property is in the custody of a person who does not claim it. *Babbit* v. *Dutcher,* 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402; and of property held by one who does claim it but whose claim is so insubstantial in fact or law or both that it is only colorable, *May* v. *Henderson,* 268 U. S. 111, 116, 45 S. Ct. 456, 69 L. Ed. 870. So, also is the ruling in the case of *In re Quan Weing,* 2 Cir., 104 F. (2d) 113, where the court said that power undoubtedly rests in Congress to provide for summary Federal jurisdiction to determine the right of a trustee in bankruptcy to recover property adversely claimed.

In the instant case the East River Savings Bank never claimed title to the chattels; the Circuit Court of Appeals in its earlier decision, 105 F. (2d) 960, held that its mortgage created a lien on the realty alone and did not affect the chattels which were located in the building. Before that decision was rendered, however, it went into possession, took, used and later sold the chattels.

In the case of *In re Rose Shoe Mfg. Co.,* 2 Cir., 168 Fed. 39, it appeared that the respondent, a bank creditor secured by accounts receivable of the bankrupt, took possession of a quantity of shoes which were returned to and were in the

hands of the bankrupt after the petition was filed, and sold them. The trustee moved for an order to direct the bank to pay over what it had collected from the sale, and in sustaining the referee's order granting the application, the court said:

> "Nor does the fact that the bank sold the shoes change the situation. The proceeds stood in their place. The court had power to direct the turning over of such proceeds to the trustee. In First National Bank *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 S. Ct. 693, 49 L. Ed. 1053, the Supreme Court said:
>
> 'The sale in the circumstances did not change the situation. The proceeds stood in the place of the property, and the order returning the proceeds was equivalent to an order returning the property.' "

A summary proceedings to recover the proceeds would be of little avail to this petitioner since the property was sold privately by the bank and the amount received was far below the actual market value as alleged in the trustee's petition (R. 9).

It is respectfully requested that this petition be granted on the basis of Rule 38, subd. 5(b) of the Revised Rules of this Court. There exists a conflict with the decisions of other circuits on the same subject as well as with a prior decision of the same court.

In the case of *Commercial Casualty Insurance Co.* v. *Williams*, 4 Cir., 49 F. (2d) 472, the Circuit Court of Appeals said:

> "This case was before this court on question of ownership of the property here in controversy. Commercial Casualty Ins. Co. *v.* Williams, 37 F. (2d) 326. This court affirmed the decision of the judge below, holding that the property in question belonged to trustee, and reference was had to a referee to take evidence *as to the value of the property* used by appellant in the

completion of the building, under the circumstances detailed in the former decision of this court above cited, and report to the District Court. Evidence was taken, and referee reported in detail *as to the value of the property*, fixing the total sum at $20,191.11. * * * * * * Here, an examination of the record convinces us that the report of the referee was clearly right. Appellant took the property wrongfully, and certainly cannot be allowed to profit by its wrong. In re Schilling, et al. (D. C.) 264 Fed. 357, and authorities there cited."

So also did it appear in the case of *In re Denson*, 195 Fed. 854 decided in the District Court for Northern Alabama wherein a fraudulent transfer was made after bankruptcy. The court said (P. 855):

"The inquiry which requires consideration is whether a summary petition in a bankruptcy cause or a plenary suit was the appropriate proceeding * * * "

And on pages 856, 857:

"* * * The petitioner, by mingling the goods with his own stock and selling part of them, had by his own act made restoration in kind impossible. The referee required him to restore the value of the goods, as invoiced, instead of the price the petitioner paid the bankrupt for them, which was 50 per cent of that amount. The amount required to be restored should represent the actual value of the goods when taken over by petitioner. The evidence as to its value is conflicting * * *

"In view of these undisputed facts and of the circumstances of extremity of the bankrupt known to the petitioner when he made the purchase, I am persuaded that they were bought by him at a sacrifice from the true value; and that the amount fixed by the referee represents the true value of the goods at the time of their receipt by petitioners."

Judge Swan in his opinion in the instant case states:

> "The appellant relies on May *v.* Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. It is true that at page 119 of 286 U. S., at page 460 of 45 St. Ct., 69 L. Ed. 870, it was said that one subject to a turn-over order to restore property to the bankrupt's estate, 'if he has sold it,' may be compelled by summary order to restore the value of the property thus wrongfully diverted. But we did not in the Reading case read this as meaning that a summary action will lie for damages for conversion of property in possession of the trustee in bankruptcy; nor do we now."

Petitioner respectfully submits that he is not seeking "damages for unlawful conversion of the chattels", as the Circuit Court of Appeals said in its opinion; but, relying upon rulings of this Court in the case of *May* v. *Henderson, supra,* and of the courts of other jurisdictions in the cases heretofore cited, he is seeking the substitute for the *res* or its reasonable value when taken by the bank, the *res* having been privately sold by the bank after possession thereof was obtained by it subsequent to the filing of the petition in bankruptcy. Nor would the situation be changed even though the act of the bank could be called a conversion because in the last analysis, it was the loss sustained by the bankruptcy estate as a result of the bank's unwarranted appropriation, use and sale of those chattels which petitioner is seeking. The bank at no time asserted title, its only claim being that it had a lien by virtue of its mortgage. That was however dispelled by the decision of the Circuit Court of Appeals on the appeal reported in 105 F. (2d) 960.

The Circuit Court of Appeals relied upon its own prior decision in the case of *In re Reading Engineering Inc.*, 29 F. (2d) 22, where it held that the trustee could summarily recover possession of such specific property of the bank-

rupt as was still on the appellant's land, and "in a proper proceeding" could recover the value of such property as the appellant had converted. In the decision from which this review is sought, the court said that a "proper proceeding" meant a plenary suit. The cases can be distinguished. In the first place, although the opinion in the *Reading* case does not so state, the respondent in the court below, who was the appellant in the Circuit Court, made a preliminary objection to the jurisdiction of the bankruptcy court to determine the controversy.

Here, the controversy which resulted in the decision from which this petition is made was commenced in 1937 by a *summary proceeding* and throughout its whole course the respondent without ever challenging the court's jurisdiction consistently took issue with the trustee in the numerous steps affecting the scope of its mortgage and the rights of the trustee with respect to the chattels which the respondent claimed were affected by its mortgage. While the court's opinion in the *Reading* case does not mention the preliminary all-important objection raised in the court below, the cases cited therein which it followed all show that objections to the jurisdiction were raised when the proceeding was first instituted.

If therefore, no other facts were stated, it quite conclusively appears that an objection to the summary jurisdiction to determine the adverse claim of the respondent was asserted in the *Reading* case at the very inception thereof before the referee; whereas here, the bank and the petitioner both joined in the contest and not until the bank was finally defeated and was pressed to make the estate whole for its improper acts on this motion, did it for the first time object to the jurisdiction of the bankruptcy court to complete its proceedings for the recovery of the value of the trustee's assets which it took and retained throughout the period of litigation.

In a decision of the same court in the case of *Times Square Auto Supply Co., Inc.*, 47 F. (2d) 210, where a bank had, after bankruptcy, appropriated assets of a bankrupt to reimburse it for overdrafts made by the bankrupt before bankruptcy, the court in discussing the power of a bankruptcy court to summarily order the repayment of the moneys, said (p. 212):

> "(The cases) proceed upon the view that property of the bankrupt which is in his possession at the filing of the petition, or comes into his possession thereafter, is constructively in the possession of the bankruptcy court and subject to its summary process; and that any person who takes such property—certainly if he has notice of the pending petition, and probably even if he has not, and pays no present consideration—is likewise subject to a summary order to return it or *to account for its value.*"

Thus we find that whereas the Second Circuit Court of Appeals held in the *Times Square* case that unlawful appropriation of bankrupt property was the subject of summary proceedings to recover its value where the property had been disposed of by the transferee, it disregarded its own opinion in the instant case and held that such a recovery was only by a plenary suit at the instance of the trustee and that the bankruptcy court had no jurisdiction to summarily fix the value of the assets improperly appropriated by the respondent and to direct respondent to account therefor.

The parties are in a court of equity and an examination of its broad powers will undoubtedly show the petitioner to be entitled to the summary relief which he seeks.

Mr. Justice Douglas in the case of *Pepper* v. *Litton*, 308 U. S. 295, 60 Sup. Ct. 238, said:

> "Courts of bankruptcy are constituted by sections 1 and 2 of the bankruptcy act 30 Stat. 544, 11 U. S.

> C. A. sections 1 (8), 11 and by the latter section are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Consequently this court has held that for many purposes "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." Local Loan Co. *v.* Hunt, 292 U. S. 234, 240, 54 S. Ct. 695, 697, 78 L. Ed. 1230, 93 A. L. R. 195. By virtue of Sec. 2 a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence. (Cites case.)"

Applying this general equitable nature of the bankruptcy court to a specific instance, this Court is referred to the case of *Local Loan Co.* v. *Hunt, supra,* where, in discussing the remedies that a trustee might have, it says:

> "* * * And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which the respondent now seeks in equity. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would be inadequate to meet the requirements of justice. As will be shown in a moment, the sole question at issue is one which the highest court of the state of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate Courts of Appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined."

The situation in the last-quoted decision and the circumstances of this case are not dissimilar. Complete equity can be done within the summary jurisdiction of the bank-

ruptcy court, where respondent will be given full opportunity to contest any proof of value offered by petitioner.

Having taken the chattels without legal authority and having used and sold them, respondent says, when asked to pay their value, that because they have been sold the only remedy left to the trustee is to commence a new suit in another forum to recover their value. For that contention we submit there is no moral, legal or equitable basis because respondent having taken property which never belonged to it, should under well established principles of law answer in the court in which every phase of the controversy was litigated for the loss which it brought about so that this bankruptcy estate could be made whole.

It is submitted that the decision of the Circuit Court of Appeals from which this review is sought if left to stand would open the door to the clandestine disposition of assets received from a bankrupt's estate after bankruptcy, leaving the trustee without the expeditious and complete remedy accorded to him by the Bankruptcy Act and compel him to seek out the wrongdoer in a forum lacking the power to give the complete remedy provided by the Bankruptcy Act. It is further submitted that because the decision conflicts with the earlier decision of the same court in the *Times Square Auto Supply* case, with the decision of the Fourth Circuit Court of Appeals in *Commercial Casualty Insurance Co.* v. *Williams*, with that of Judge Grubb *In re Denson* and with *May* v. *Henderson* of this Court, let alone that it is in violation of the spirit and tenor of the Bankruptcy Act, this petition should be granted.

It would be a mockery of justice to first permit the Federal court to determine that title to the chattels was vested in the trustee as of the date when the petition was filed, and then require the trustee to institute a plenary action in another court to recover their value against a proven wrongdoer who admittedly had taken them from the custody of

the bankruptcy court and had made use of and later sold them.

Could the spirit of the Bankruptcy Act be so easily thwarted by interpretations which will require a plenary suit to recover the *res*, or the proceeds thereof if it be sold or the value thereof if it be commingled? And yet the Circuit Court of Appeals has refused to grant the same relief where the property has been taken and sold at a price far below its market value and where the chattels have been put to such continued use as to leave them presently worthless.

Indeed, the question appears to have been a novel one even to the Circuit Court of Appeals, for it said in its opening statement, "This appeal presents an interesting question of summary jurisdiction in bankruptcy." Surely, had the question been settled in the judgment of the court, there would have been no necessity for that statement unless it be that the court overlooked or refused to follow the decisions of the other circuits or misconstrued the decision of this Court in *May* v. *Henderson* by its interpretation thereof in its own previous decision *In re Reading Engineering, Inc.*, upon which it relied in sustaining the District Court in the case at bar.

To deny the relief here sought is to establish a dangerous precedent. An admitted wrongdoer who takes assets from a bankrupt's estate may evade the summary jurisdiction of the bankruptcy court by selling them for little or no consideration, thereby burdening the estate with the expense entailed in prosecuting a plenary action for the purpose of making the estate whole. The respondent never asserted an adverse claim, nor does it dispute petitioner's title to the chattels. It merely claimed a lien under its mortgage which the court overruled. 105 F. (2d) 960. It therefore stands liable to petitioner upon an implied contract to pay for the value of the chattels which it took; and the bankruptcy

court having once taken jurisdiction was vested with power to award final judgment to petitioner for the loss he sustained as a result of the respondent's acts. Whether the taking by the bank was tortious as by conversion or under an implied contract to pay for what it took is, it is submitted, of no importance; and the view of the Circuit Court of Appeals that the taking was of the former nature and for that reason it was beyond the power of the bankruptcy court to accord a remedy was clearly erroneous.

This litigation, as has been stated by the Referee (R. 16) has been in the District Court for over four years, three appeals were taken to the Circuit Court of Appeals and one to the New York Court of Appeals—all in respondent's effort to further an unfounded claim to chattels which represent the sole assets of this estate; and now, after all its efforts have been defeated and nothing remains but to collect from it the loss which this trustee sustained by reason of the depreciation and sale of the assets while they were in the hands of the Bank throughout the numerous legal proceedings, should this trustee be required to commence a new suit in a different forum to collect what this bankruptcy court has adequate authority to give him? It is respectfully submitted that to answer that question in the affirmative would be unjust and would satisfy the cravings of the respondent for endless litigation.

WHEREFORE, it is submitted that for the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1941

No. 219

SAMUEL NEWFIELD, Trustee of the 671 Prospect Avenue Holding Corporation,
Petitioner,
against
EAST RIVER SAVINGS BANK.

BRIEF FOR EAST RIVER SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1941

No. 219

SAMUEL NEWFIELD, Trustee of the 671 Prospect Avenue Holding Corporation, Petitioner,

against

EAST RIVER SAVINGS BANK.

BRIEF FOR EAST RIVER SAVINGS BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Since, as the Court below observed (R. 33), the allegations of the petition must be deemed true for the purposes of this application, respondent cannot presently dispute any of the facts presented by petitioner.

Respondent does wish, however, to supply one fact omitted by petitioner. When the Circuit Court of Appeals in its decision reported in 105 Fed. (2d) 960 reversed its prior holding on the identical question reported in 97 Fed. (2d) 513, it based its reversal upon an intervening decision of the Court of Appeals of the State of New York in *East River Savings Bank* v. *671 Prospect Avenue Holding Corporation*, 280 N. Y. 342. The Court of Appeals,

in passing upon the validity of respondent's lien on the chattels in dispute herein under the identical mortgage passed upon in 97 Fed. (2d) 513, strongly implied that no lien existed. This decision was the sole basis for the Circuit Court of Appeals' reversal of its own decision (R. 34) as it had no alternative but to follow the State law on the question presented which had so recently been established with respect to the identical mortgage.

Question Presented

The question before this Court on this application is not fairly put in petitioner's brief (p. 5) for the Court below held that petitioner was entitled to maintain other summary proceedings to recover the chattels or the proceeds of their sale or to maintain a plenary suit for conversion (R. 36). The question presented is as follows:

"May petitioner maintain a summary proceeding to recover unliquidated damages for an alleged conversion or must he proceed by plenary suit?"

ARGUMENT

POINT I

The Trustee in seeking a personal money judgment is attempting to make improper use of a summary proceeding which is a proceeding *in rem*.

A summary proceeding is a device employed by a trustee to recover the assets of a bankrupt's estate. It was designed to facilitate the gathering of such assets and the determination of the validity of liens thereon in order to avoid the waste of the bankrupt's assets in more protracted litigation. Such a proceeding, directed against the assets of the bankrupt estate, is fundamentally a proceeding *in rem*.

In

Murphy v. *Hofman,* 211 U. S. 562, 570, 29 Sup. Ct. 154, 157, 53 L. Ed. 327,

this Court stated:

> "The last two cases cited [*Whitney* v. *Wenman,* 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *White* v. *Schloerb,* 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183] proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res,* as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court."

To the same effect is the following statement from the case of *Whitney* v. *Wenman,* 198 U. S. 539, 552, 25 Sup. Ct. 778, 781, 49 L. Ed. 1157:

> "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

This concept is found in all of the principal reported cases involving "turn-over" proceedings. For example, in *White* v. *Schloerb,* 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, it was held that jurisdiction existed to compel a return of the bankrupt's stock of goods to the trustee; in *Babbitt* v. *Dutcher,* 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, summary jurisdiction to recover record books of the

bankrupt was approved; in *May* v. *Henderson,* 268 U. S. 111, 45 Sup. Ct. 456, 69 L. Ed. 870, a credit or a chose in action amounting to $12,000 was returned to the trustee. In all of these cases, this Court has demonstrated the proper function of a summary proceeding to be the recovery of the bankrupt's assets and its proper object to be the *res,* the bankrupt's estate. No case cited by petitioner states the contrary.

The case of

> *In re Reading Engineering, Inc.,* 29 Fed. (2d) (C. C. A. 2) 22,

on which the Court below based its decision, emphasized this *in rem* nature of a summary proceeding. There, the trustee sought to recover the value of certain chattels or the proceeds of their sale. The chattels were still in existence and were still where the bankrupt left them at the time the summary proceeding was instituted. The Court held, in view of such facts, that a summary proceeding was improper and in so doing relied on the rulings of this Court to the effect that the *res* is the primary object of a summary proceeding.

The Court in the *Reading* case, in following this concept, enunciated this rule at page 23:

> "* * * the property belonging to the bankrupt's estate, if it is in existence, and can be identified and turned over to the trustee, should be turned over, rather than the alleged proceeds of such property."

The Court further stated at page 23:

> "* * * appellant Hoisting Company is only responsible, *in a proper proceeding,* for such property as cannot be traced, identified and returned." (Italics added.)

In support of this last statement, the case of

> *In re Rose Shoe Manufacturing Co.*, 168 Fed. 39 (C. C. A. 2),

strongly relied on by petitioner, was cited. In that case the respondent therein had sold certain chattels and had retained the proceeds. The Court required a turnover of such proceeds on the ground that they stood in the place of the chattels and that an order requiring a turnover of such proceeds was equivalent to an order requiring a turnover of the chattels themselves (citing *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051). However, there was no showing there, as there was in the *Reading* case, and as there is in the instant case (R. 7), that the chattels were still in existence, where the bankrupt left them, or could be "traced, identified and returned". Moreover, the trustee in this proceeding does not seek a turnover of the proceeds of the alleged sale and goes so far as to expressly disclaim any desire to the proceeds of the sale (Trustee's Brief, p. 7). The trustee says:

> "A summary proceeding to recover the proceeds would be of little avail to this petitioner since the property was sold privately by the bank and the amount received was far below the actual market value as alleged in the trustee's petition (R. 9)."

The *Reading* case, 29 Fed. (2d) (C. C. A. 2) 22, also considered the case of

> *In re Denson*, 195 Fed. 854 (D. C. N. D. Ala., 1912),

also relied on by petitioner, and stated at page 23 that the case turned on the finding that the property had been mingled with other property and that recovery in kind was impossible. No such fact was present in the *Reading* case, nor is there any such fact present in the instant case since here the chattels can be traced, identified and returned.

The decision in the *Reading* case and the decision which the Court arrived at in the instant case are, it is respectfully submitted, in accord with each other and in accord with the principles enunciated by this Court in *May* v. *Henderson,* supra, despite petitioner's contention that a conflict exists. The Court will recall that in *May* v. *Henderson,* the respondent was directed in a summary proceeding to return to the trustee a credit which had been part of the bankrupt's estate. As was pointed out in the *Reading* case (p. 23) this credit was the *res* itself. The decisions of the Court below in the *Reading* case and in the instant case, both of which hold that a summary proceeding must be directed primarily against the *res,* can under no theory whatever be considered to be in conflict with the decision in *May* v. *Henderson,* where this Court directed the return of the *res* itself. Moreover, the language of this Court in *May* v. *Henderson* concerning the turnover of the value of the property which had been sold, is respected by the Court below since it expressly permits the maintenance of another summary proceeding to recover the chattels or to recover the proceeds of their sale, provided such summary proceeding is designed to recapture the *res* and is not an attempt to recover damages in tort (R. 36).

Petitioner himself recognizes the rule concerning the *in rem* nature of a summary proceeding as he strenuously attempts to come within its terms. He states at page 9 of his brief that he is not seeking "damages for unlawful conversion" (the characterization placed on this proceeding by the Court below), but rather is seeking to recover a so-called "substitute for the *res*". It is submitted that this interpretation of the instant proceeding is erroneous, as an examination of the record will reveal.

The order to show cause refers to an order

> "* * * fixing the damages sustained by the trustee by reason of the improper and unlawful appropriation and use by the East River Savings Bank of the chattels * * *" (R. 3).

The petition prays for an order "fixing the damages" and the payment of "the damages so fixed" (R. 10). The Referee below stated that this proceeding was a motion to "fix the damages" sustained "by reason of the improper and unlawful appropriation and use by the East River Savings Bank of the chattels * * *" (R. 15, 16). The Referee's order (R. 19), the petition for review (R. 22), the certificate of review (R. 25), the District Judge's order (R. 28), and petitioner's own notice of appeal (R. 29), contain the same statement.

The District Judge who held against summary jurisdiction stated:

> "What is here desired is the fixation of damages for the wrongful use and withholding of property of the bankrupt * * *" (R. 27).

Finally the decision of the Court below (R. 35) concludes:

> "What the trustee seeks is an order directing the Bank to pay damages for unlawful conversion of the chattels."

Petitioner's contention that he is not seeking to recover damages, but is seeking to recover the "substitute for the *res*", in the face of this record, is untenable.

The Court will also note that although most of the allegations of the petition are made with great particularity and detail, there is no allegation that petitioner wants the chattels or that petitioner ever demanded their return or, indeed, that he ever made any effort whatsoever to recover them. The obvious fact deducible from this omission is that *petitioner does not want the chattels* even though the trustee may obtain them. Thus, out of the trustee's own papers is the anomaly of his position revealed. He wants a "substitute for the *res*", but not the *res* itself. He wants something to which he is not entitled in place of something to which, admittedly, he is entitled.

POINT II

The decision of the Court below is not in conflict with decisions of this Court or with decisions of any other circuit.

Certiorari is sought on the ground that the decision of the Court below is in conflict not only with the decisions of other circuits, but also with prior decisions of the same circuit. It is submitted that the decision below is completely in accord with the prior decision in the *Reading* case, as indeed it had to be, since the facts in both cases were almost identical, it appearing in the instant case, as in the *Reading* case, that the chattels were in existence and were where the bankrupt left them at the time when this proceeding was instituted (R. 7). The ruling below, as has been demonstrated above, is fully in accord with all of the decisions of this Court which hold that a summary proceeding should be diected against the *res,* and is directly parallel with the ruling in another case relied on by petitioner,

> *In re Times Square Auto Supply Company,* 47 Fed. (2d) 210 (C. C. A. 2).

In that case the *res,* which was a sum of money, was ordered returned in a summary proceeding.

It has already been shown that this ruling is not in any way in dispute with either the case of *In re Rose Shoe Manufacturing Company,* supra, or *In re Denson,* supra, as the opinion in the *Reading* case has correctly pointed out the distinction between these classes of cases. Rather than being in conflict with any of these decisions, the decision of the Court below, following the decision in the *Reading* case, only buttresses the principle that a summary proceeding is to be directed solely against the *res* as long as it is in existence and capable of delivery to the trustee.

Petitioner cites the case of *Commercial Casualty Insurance Company* v. *Williams,* 49 Fed. (2d) 472 (C. C. A. 4), as being in conflict with the decision below. Even a cursory reading of that case will reveal that the controversy there arose in a plenary suit in which title to the chattels was in dispute. The District Judge, after a full trial on the merits, determined that title was vested in the trustee and directed that a reference be held to determine their value. That case had nothing to do with summary proceedings.

POINT III

Respondent did not lose its right to contest the Court's jurisdiction by participating in another summary proceeding concerning the validity of respondent's lien on the chattels.

Petitioner contends that respondent lost its right to object to the jurisdiction of the Court by failing to do so in another proceeding. That proceeding was instituted four years ago, before the occurrences upon which the present application is based took place, to have respondent's asserted lien on the chattels declared void. Nothing else was requested by the trustee at that time. Respondent, therefore, could not contest jurisdiction as the issue involved was the validity of a lien on the *res* (*Whitney* v. *Wenman,* supra). That proceeding resulted in the decisions in 97 Fed. (2d) 513 and 105 Fed. (2d) 960, and the only relief granted was the relief prayed for: respondent's lien was declared void. Thereupon petitioner sought to tack on to the order on mandate a direction that damages be fixed against respondent. This attempt was rejected by the District Judge and the order on mandate, as entered, did not presume to grant petitioner any greater relief than he prayed for.

Further, the two proceedings do not constitute but one proceeding as the trustee urges. Each sought a different

form of relief. The first was a proceeding *in rem,* the second *in personam.* All of the material facts alleged in the petition herein occurred after the first proceeding was brought. The trustee himself treated the instant proceeding as a proceeding *de novo,* as he served the order to show cause on respondent personally and not on the attorneys who appeared for it in the prior proceeding. The Court below and the District Judge found no merit in this contention and even the Referee below stated in regard to this issue:

> " * * * I do not think that their taking part in another proceeding waived their rights in this" (R. 18).

POINT IV

The issues presented in the petition are numerous and respondent will be deprived of important substantive rights if it is not permitted to try these issues in a plenary action.

As stated above, the only question ever raised by petitioner and the only question ever decided was the invalidity of the lien once asserted by respondent. From this premise petitioner leaps to the conclusion that respondent is liable in damages. Just what the damages should be assessed for is not very clear. A reading of the petition shows that petitioner does not want the chattels since he never demanded their return. It also appears that he is not seeking the recovery of the "proceeds" of the alleged sale of the chattels, for he so states in his brief (p. 7). Likewise, petitioner insists that he is not seeking "damages for unlawful conversion of the chattels" (Petitioner's Brief, p. 9).

Petitioner, however, gives point to his summary proceeding by suggesting that respondent is liable on some nebulous "implied contract". The details of this theory are still vague. Nevertheless, it should be quite clear that petitioner wants damages and that he believes that he is entitled to them without further delay. The only issues

now open, according to petitioner's theory of the law, is the amount of damages which respondent must pay him, for the Court will note the statement on page 13 of petitioner's brief to the effect that on the hearing respondent will have full opportunity to contest any proof as to the value of the chattels. Petitioner assumes as established facts that respondent was the possessor of the chattels and unlawfully withheld possession; that respondent used and misappropriated (but did not convert) the chattels and is liable for damages.

But these facts not only have never been determined by any Court, but have never even been presented to any Court for determination. Petitioner has adjudicated them for himself and asks this Court to approve such preadjudication. The process employed in arriving at this conclusion is not apparent, but it was probably by the same process by which respondent is castigated as an "admitted wrongdoer".

It is petitioner who cries to this Court for equity and it is petitioner who decries the decision of the Court below as a "mockery of justice". And yet the equity he seeks is a decision of this Court preadjudicating all of the necessary elements of the tort of conversion in his favor and foreclosing the respondent of the right even to deny these elements. The justice which he demands is that this Court find that the only question now unsettled is the amount of damages, when it has never been determined whether any liability for damages exists.

These strained interpretations of justice and equity are asserted only in an effort to circumvent the force of two important facts:

First: The chattels are still in existence where the bankrupt left them.

Second: The trustee does not want them and never demanded them from respondent or anyone else.

From trustee's failure to recognize the importance of these facts, this "endless litigation" has arisen.

CONCLUSION

The case presents no question meriting certiorari. The petition should be denied.

Respectfully submitted,

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